avail him merely because of a rule which is within the control of the court, would be to do injustice judicially and with deliberation.

If the newly-discovered evidence is of a different kind and character from that adduced on the trial it will not be liable to the objection that it is cumulative: *Guion* v. *Butts*, 4 Wend. 579; *Gardner* v. *Mitchell*, 6 Pick. 114; *Watts* v. *Howard*, 7 Metc. 478, 480.

In the case before me the newly-discovered evidence consists of statements made by the complainant to the witnesses that she had conveyed the property in question to the defendant. The evidence of admissions in the cause is very slight, and is not of the same kind as that which is now offered. There can be no doubt of the importance of the testimony to the defendant. The complainant's case is based on her ignorance of the character of the deeds which she executed, by which the property was conveyed to her son, the defendant.

If, then, the newly-discovered evidence now offered is of a character such as, under like circumstances, would be ground for a new trial in an action at law, why should it not under the circumstances be admitted here? If there had been a trial at law, in an action at law, between these parties, resulting in a judgment against the defendant, and he had discovered the evidence only when too late to avail himself of it at law, this court would have relieved him on that ground. And shall it be said that its practice constrains it to perpetrate the injustice against which it would grant relief if it occurred in another forum? The admission of the evidence is within the discretion of the court, and there it should rest in order to guard against imposition on the one hand, and a failure of justice on the other.

The testimony will be opened, under the direction of the vice-chancellor, to admit the newly-discovered evidence, and to give the complainant opportunity to meet it by counter evidence.

Supreme Court of Michigan.

EDWARD SMITH *v.* ALLAN SHELDON ET AL.

After the dissolution of a partnership, even if it be conceded that the liquidating partner has authority to give an acknowledgment of debt in the firm name, yet he has no authority, by implication of law, to give a note in the firm name, which increases the amount of the indebtedness, or extends the time of liability, or in any way amounts to a new contract.

After the dissolution of a partnership, if one partner buys out the interest of

the others, and agrees to assume the debts, he becomes, as between the parties, the principal debtor, and the retiring partners merely sureties, and creditors of the firm having knowledge of this equity are bound to regard it in their subsequent dealings with the parties.

Where, after the dissolution of a firm under such circumstances, a creditor accepted from the liquidating partner, without the knowledge of the others, a note in the firm name, with interest at a special rate, the retiring partners were thereby discharged from the original debt.

This result was not varied by the fact that the note was at very short time, one day, where the agreement for a high rate of interest showed an intention to give indulgence beyond the time named, and such indulgence was, in fact, given until the principal debtor became insolvent. These facts, while legally immaterial, have a strong bearing on the equities, by showing that the creditor bargained for an advantage that the sureties were not to share, and therefore they could not be compelled to share the risk.

ERROR to Wayne Circuit.

Prior to June 1867, Edward Smith, Isaac Place and Francis B. Owen, were partners in trade under the firm name of Place, Smith & Owen, and as such became indebted to defendants in error in the sum of $969, on book account.

In the month mentioned the firm was dissolved by mutual consent, Place purchasing the assets of his co-partners, and agreeing to pay off the partnership liabilities, including that to the defendants in error.

On the second day of the following month Place informed the defendants in error of this arrangement, and that he had taken the assets and assumed the liabilities of the firm, and they, without the consent or knowledge of Smith and Owen, took from Place a note for the amount of the firm indebtedness to them, payable at one day with ten per centum interest. They did not agree to receive this note in payment of the partnership indebtedness, but they kept it and continued their dealings with Place, who made payments upon it. The payments, however, did not keep down the interest.

Place, in 1872, became insolvent, and made an assignment, and Smith was then called upon to make payment of the note. This was the first notice he had that he was looked to for payment. On his declining to make payment, suit was brought on the original indebtedness and judgment recovered, which this writ was brought to reverse.

C. & W. N. Draper and *C. I. Walker*, for plaintiff in error, cited *Stephens* v. *Thompson*, 28 Vt. 77; *Harris et al.* v. *Lindsay*, 4 Wash. C. C. 98, 271; *Smith* v. *Rogers*, 17 Johns. 340; *Mouldon*

v. *Whittock*, 1 Cow. 290; *Rosseau* v. *Call*, 14 Vt. 83; *Waydell* v. *Luer*, 3 Denio 410; *Livingston* v. *Radcliff*, 6 Barb. 244; *Van Eps* v. *Dillaye*, 6 Barb. 532; *King* v. *Lowry*, 20 Id. 532; *Thurber* v. *Corbin*, 51 Id. 215; *Colgrove* v. *Tallman*, 2 Lansing 97; *Wilson* v. *Lloyd*, Law Rep. 16 Eq. 60.

E. W. Meddaugh, for defendants in error.

1. Nothing short of an express agreement by creditors will discharge retiring partners: Parsons on Partnership 421; Story on Part., sects. 154–6; Collyer on Part., 5th Am. ed., sects. 487, 563.

2. The promissory note of a third person, taken for an antecedent debt, is not a payment unless by agreement: *Johnson* v. *Weed*, 9 Johns. 310; *Foley* v. *Barber*, 5 Id. 68; *Jaffray* v. *Cornish*, 10 N. H. 505; *Davidson* v. *Bridgeport*, 8 Conn. 472.

3. Taking note of another than the debtor is an extinguishment of the debt *only* when so agreed: *Jewitt* v. *Pleak*, 43 Ind. 368. *Devlin* v. *Chamblin*, 6 Minn. 468; *Hotchin* v. *Secor*, 8 Mich. 494; *Dudgeon* v. *Haggart*, 17 Mich. 273. This involves the principle under discussion. The question in both instances is, the creditor having taken an obligation other than that of his debtors, whether or not he thereby has lost his remedy against them. The rule for determining this should be the same in both.

4. A note of the surviving member of a firm, given in adjustment of a creditor's account against the firm, will not be deemed a payment of the account unless such is shown to have been the agreement: *Leach* v. *Church*, 15 Ohio St. 169; *Bowen* v. *Still*, 49 Penn. St. 65; *Van Eps* v. *Dillaye*, 6 Barb. 244; *Spear* v. *Atkinson*, 1 Ired. 262; *Thompson* v. *Briggs*, 28 N. H. (8 Foster) 40; *Powell* v. *Charless*, 34 Misso. 485; *Keerl* v. *Bridgers*, 18 Miss. (10 S. & M.) 612; *Sneed* v. *Wiester*, 2 A. K. Marsh. (Ky.) 277; *Rayburn* v. *Day*, 27 Ill. 46; *Tyner* v. *Stoops*, 11 Ind. 22; *Bonnell* v. *Chamberlin*, 26 Conn. 487; *Smith* v. *Rogers*, 17 Johns. 340. This question is touched upon in *Botsford* v. *Kleinhaus*, 29 Mich. 332.

That the *mere* acceptance of the promissory note of a less number than all of the joint debtors will not discharge the joint liability, see *Drake* v. *Mitchell*, 3 East 251; *Tobey* v. *Barber*, 5 Johns. 68; *Johnson* v. *Weed*, 9 Johns. 310; *Thompson et al.* v. *Percival*, 5 B. & Ad. 925; *Reed* v. *White et al.*, 5 Esp. 122; *Evans* v. *Drummond*, 4 Id. 92; *Harris* v. *Farwell*, 15 Beav. 31.

The cases cited by plaintiff in error are all distinguishable.

Most of them are merely affirmations of the rule that the acceptance of the note of one partner will be a discharge of the others *if such is the agreement* of the creditor accepting it. This is conceded, but it does not reach this case, where there was no such agreement.

The opinion of the court was delivered by

COOLEY, C. J.—The position taken by the plaintiffs below was that, as they had never received payment of their bill for merchandise, they were entitled to recover it of those who made the debt; the giving of the note which still remained unpaid being immaterial. On behalf of Smith it was contended that by the arrangement between Place and his co-partners, the latter, as between the three, became the principal debtor, and that from the time when the creditors were informed of this arrangement they were bound to regard Place as principal debtor, and Smith and Owen as sureties, and that any dealing of the creditors with the principal to the injury of the sureties would have the effect to release them from liability; and it is further contended that the taking of the note from Place, and thereby giving him time, however short, was in law presumptively injurious.

Upon this state of facts the following questions have been argued in this court:—

1. Was the note given by Place in the co-partnership name for the co-partnership indebtedness, but given after the dissolution, binding upon Smith and Owen?

2. If Smith and Owen were not bound by the note, were they entitled to the rights of sureties? And

3. Did the taking of the note given by Place discharge Smith and Owen from their former liability?

On the first point it is argued in support of the payment tha when a co-partnership is dissolved, the partner who is entrusted with the settlement of the concern should be held to have implied authority to give notes in settlement. On the other hand it is insisted that in law he has no such authority, and that if he assumes, as was done in this case, to give a note in the partnership name, it will in law be his individual note only.

Whatever might be the case if the obligation which was given had been a mere acknowledgment of the amount due, in the form of a due bill or I. O. U., we are satisfied that there is no good reason for recognising in the partner who is to adjust the business of

the concern, any implied authority to execute such a note as was given in this case. This note was something more than a mere acknowledgment of indebtedness, and it bore interest at a large rate. It was in every respect a new contract. The liability of the parties upon their indebtedness would be increased by it if valid, and their rights might be seriously compromised by the execution of paper payable at a considerable time in the future, if the partner entrusted with the adjustment of their concerns were authorized to make new contracts. It was assumed in *F. & M. Bank* v. *Kercheval*, 8 Mich. 506, 519, that the law was well settled that no such implied authority existed; and we are not aware that this has before been questioned in this state. See *Pennoyer* v. *David*, 8 Mich. 407. We think it much safer to require authority when such obligations are contemplated, than to leave one party at liberty to execute at discretion, new contracts of this nature, which may postpone for an indefinite period the settlement of their concerns, when a settlement is the very purpose for which he is to act at all.

For a determination of the question whether Smith and Owen were entitled to the rights of sureties, it seems only necessary to point out the relative positions of the several parties as regards the partnership debt. Place by the arrangement had agreed to pay this debt and as between himself and Smith and Owen, he was legally bound to do so. But Smith and Owen were also liable to the creditors equally with Place, and the latter might look to all three together. Had they done so, and made collection from Smith and Owen, these parties would have been entitled to demand indemnity from Place. This we believe to be a correct statement of the relative rights and obligations of all.

Now a surety, as we understand it, is a person who, being liable to pay a debt or perform an obligation, is entitled, if it is enforced against him, to be indemnified by some other person, who ought himself to have made payment or performed before the surety was compelled to do so. It is immaterial in what form the relation of principal and surety is established, or whether the credit is or is not contracted within the two capacities, as is often the case when notes are given or bonds taken. The relation is fixed by the arrangement and equities between the debtors, and may be known to the creditor or wholly unknown. If it is unknown to him, his rights are in no manner affected by it; but if he knows that one

party is surety merely, it is only just to require of him that in any subsequent action he may take regarding the debt, he shall not lose sight of the surety's equities.

That Smith and Owen were sureties for Place, and the latter was principal debtor after the dissolution of the co-partnership seems to us unquestionable. It was then the duty of Place to pay this debt and save them from being called upon for the amount. But if the creditors, having a right to proceed against them all, should take steps for the purpose, the duty of Place to indemnify and the right of Smith and Owen to demand indemnity were clear. Every element of suretyship is here present; as much as if, in contracting an original indebtedness, the contract itself has been made to show on its face that one of the obligors was surety merely. As already stated, it is immaterial how the fact is established, or whether the creditor is or is not a party to the arrangement which establishes it.

This view of the position of the parties indicates clearly the right of Smith and Owen to the ordinary rights and equities of sureties. The cases which have held that retiring partners thus situated are to be treated as sureties merely, have attempted no change in the law, but are entirely in harmony with older authorities which have only applied the like principle to different states of facts, where the relative position of the parties as regards the debt was precisely the same. We do not regard them as working any innovation whatever. The cases we particularly refer to are *Oakeley* v. *Passeller*, 4 Cl. & Fin. 207; *Wilson* v. *Lloyd*, Law Rep. 16 Eq. Cas. 60, and *Midlard* v. *Thorn*, 56 N. Y. 402.

And it follows as a necessary result from what has been stated that Smith and Owen were discharged by the arrangement made by the creditors with Place. They took his note on time, with knowledge that Place had become the principal debtor, and without the consent or knowledge of the sureties. They thereby endangered the security of the sureties and as the event has proved indulged Place until the security became of no value. True, they gave but very short time in the first instance; but, as was remarked by the vice-chancellor in *Wilson* v. *Lloyd*, Law Rep. 16 Eq. Cas. 60, 71, "the length of time makes no kind of difference." The time was the same in *Fellows* v. *Prentis*, 3 Denio 512, where the surety was also held discharged, and see *Okie* v. *Spencer*, 2 Wheat. 253.

But that indulgence beyond the time fixed was contemplated when the note was given, is manifest from the fact that it was made payable with interest. In a legal point of view this would be immaterial, but it has a bearing on the equities, and it shows that the creditors received or bargained for a consideration for the very indulgence which was granted, and which ended in the insolvency of Place. When they thus bargain for an advantage which the sureties are not to share with them, it is neither right nor lawful for them to turn over to the sureties all the risks. This is the legal view of such a transaction; and in most cases it works substantial justice.

The judgment must be reversed with costs, and a new trial ordered.

Supreme Court of Indiana, March 1877.

JAMES STANLEY *v.* SUTHERLAND & KEARNS, Adm'rs.

A court of bankruptcy has no authority to order the sale of property alleged to belong to a bankrupt, where it is in possession of another person claiming to be the owner.

Section 5063 of the Revised Bankrupt Act relating to the sale of disputed property and holding the proceeds to abide the result of the determination of title, does not extend to cases where another person is in possession under claim of title.

In cases to which that section does extend there must be notice to the claimant, and without it the proceeding would be void as to him.

Property in the possession of A. under claim of title was seized by the sheriff under an execution from a state court as the property of B. A petition in bankruptcy was then filed against B. and subsequently an order was made by the Bankruptcy Court on the sheriff to deliver the property to B.'s assignee, which he did. An action against the sheriff for trespass in taking the goods from him was brought by A. after the petition in bankruptcy had been filed against B., but before the order to the sheriff to deliver the goods to the assignee. *Held*, that the delivery of the goods to the assignee under the order of the Bankruptcy Court was no defence to the sheriff in such action.

In such an action it appeared that plaintiff's title was by purchase from the bankrupt with some knowledge of his affairs: *Held*, that the question was not whether the title of plaintiff was invalid under the Bankrupt Act, but whether it was good or not under the state law. Neither the assignee nor any one entitled to question the validity of the sale under the Bankrupt Act being party to the action, the Bankrupt Act had no application whatever.

From Cass Circuit Court. This was an action by George C. Sutherland against the appellant, Stanley, to recover a stock of goods or the value thereof, a schedule of which was set out, alleged to belong to the plaintiff and to have been in his possession, and to have